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No. 88-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, *ET AL.*
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS THE COUNCIL OF THE CITY OF NEW ORLEANS, *ET AL.*

OKLA JONES, II
City Attorney
BRUCE E. NACCARI
Assistant City Attorney
BEVERLY ZERVIGON
Administrator, Council
Utility Regulatory Office
1300 Perdido Street
New Orleans, Louisiana 70112
(504) 586-4651

KENNETH M. CARTER
SIDNEY H. CATES, IV
CARTER & CATES
Suite 1230 Energy Center
1100 Poydras Street
New Orleans, Louisiana 70163
(504) 569-2005

CLINTON A. VINCE*
BERNHARDT K. WRUBLE
NANCY A. WODKA
JOHN S. MOOT
VERNER, LIIPFERT,
BERNHARD,
McPHERSON AND HAND,
CHARTERED
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

WALTER J. WILKERSON
WILKERSON, HENRY & PEREZ
Suite 1800, Poydras Center
650 Poydras Street
New Orleans, Louisiana 70130
(504) 522-4572

*Counsel of Record

March 31, 1989

Balmar Legal Publishing Division, Washington, D.C. 20005 (202) 659-3610

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QUESTION PRESENTED

Whether the courts below were correct in adhering to the established rules set forth in *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny; *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and in holding that the district court could properly abstain, in favor of state review, from determining the merits of petitioner's action to enjoin enforcement of a state utility rate order on the basis of petitioner's claim that the Federal Energy Regulatory Commission ("FERC") had implicitly preempted state action; where,

(1) petitioner had been directed by the federal courts, years before, to channel its objections to this state regulatory proceeding through the state system, but had refused;

(2) petitioner had presented its preemption claim in the state regulatory proceeding, where it was fairly considered, but petitioner declined to pursue state judicial review;

(3) the state court system was open to hear petitioner's claims for preliminary and permanent relief based on federal and state issues;

(4) state court litigation concerning the rate order was pending;

(5) the "delay" of which petitioner complains was occasioned by its refusal to use the state courts;

(6) the establishment of local retail utility rates involves extremely sensitive, historically recognized local interests, as well as a longstanding system of state regulation;

(7) the action taken by the local regulator was, on its face, manifestly within its jurisdiction;

(8) the claim of preemption cannot reasonably be characterized as direct or facial, as the courts below and two state courts have held, and resolution of the federal claim requires an understanding of, and an effort to mediate, both federal and state interests;

(9) the state has not had a chance to establish an authoritative regulatory policy here, and failure to abstain would draw the federal courts into a review of the lowest echelon expression of state policy in this area; and assuming *arguendo* that further consideration of the preemption issue is appropriate,

(10) the action of the local regulator was in fact not preempted, when it (a) accepted as a "given" the FERC's allocation of costs; (b) dealt with the question of a utility's responsibility to reduce risk and found, on evidence not challenged here, that the utility's management was imprudent; (c) did not "trap" any costs, but did impose a disallowance because of the utility's failure to realize cost-savings through other transactions, as the utility said it could do; and (d) tailored its remedy so as to insure that the utility could meet its FERC-imposed obligations?

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BRIEF FOR RESPONDENTS THE COUNCIL OF THE CITY OF NEW ORLEANS, *ET AL.*

COUNTERSTATEMENT OF THE CASE

In their "Statements of the Case," petitioner ("NOPSI") and the government omit relevant facts, make assertions that contradict the record, and begin this case with the Court's *MP&L* decision.[1] This case has a less contrived starting point and deeper roots.

A. Introduction

This is the third federal action initiated by NOPSI for the purpose of interfering with state proceedings for the determination, and appellate review, of retail utility rates and practices.

This dispute first arose in 1985 when NOPSI filed an application with the Council for a retail rate increase to recover its share of the costs of the Grand Gulf I nuclear power plant ("Grand Gulf"), as authoritatively set by the FERC. Grand Gulf is, by any

[1] *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S. Ct. 2428 (1988) ("*MP&L*"); (Pet. Br. at 2; Gov't Br. at 2).

standard, a commercial failure. Characterized by a federal appeals court as "catastrophically uneconomical,"[2] it entered service in 1985 at a cost exceeding $3.6 billion, nearly six times original projections. (JA-19.) NOPSI's share, if passed through fully and immediately, would have resulted in as much as a 60% increase in retail electric rates. (JA-21.) The "severe rate shock effect"[3] of such an immediate increase was potentially devastating.[4]

While the Council was considering — responsibly and in good faith[5] — NOPSI's application and certain rate moderation plans, NOPSI sued in federal court (a) to require the Council to pass through all Grand Gulf costs immediately and without moderation and (b) to intimidate, seeking $1 billion in damages from the Council members personally. After denying NOPSI's request for a preliminary injunction and directing NOPSI to seek interim relief from the Council, which NOPSI had spurned, the district court in September 1985 abstained. The Court of Appeals in September 1986 affirmed on that point. Both courts advised NOPSI to bring its challenges in the state adjudicatory system. *NOPSI I* (n.3 *supra*).

[2] *Mississippi Indus., Inc. v. FERC*, 808 F.2d 1525, 1528 (D.C. Cir.), *vacated in part*, 822 F.2d 1104 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 500 (1987).

[3] *New Orleans Pub. Serv. Inc. v. City of New Orleans*, No. 85-3398, slip op. at 5 (E.D. La. Sept. 16, 1985), *rev'd*, 782 F.2d 1236 (5th Cir.), *modified and withdrawn in part*, 798 F. 2d 858 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1910 (1987) ("*NOPSI I*").

[4] Evidence developed in the Council proceedings showed that the immediate, unmitigated pass-through of Grand Gulf costs would result in the loss of over 6,000 jobs, make it impossible for over 1,100 otherwise qualified families to qualify for mortgage loans, push the income of 1,760 families below the poverty line, reduce state and local tax revenues by over $30 million annually, and otherwise have a profound adverse effect. (*See* JA-21 n.2.)

There was further concern for the so-called "death spiral" effect of "rate shock." That is, low-income residents as well as energy-intensive or marginal businesses, unable to pay electric bills, move or close. The unpaid costs are then passed on to a diminished customer base, further increasing their electric bills. This triggers a new round of failures, and so on, destroying the community's economy.

[5] In *NOPSI I*, the district court held that the Council "is utilizing every feasible alternative to keep NOPSI in a positive cash position" throughout its consideration of NOPSI's request for a rate increase, and further, that "the Council is determined to assist NOPSI in maintaining a positive cash position by pursuing a number of feasible alternatives." Slip op. at 11-12.

Despite the district court's abstention ruling, NOPSI filed a second federal action in November 1985, after the Council commenced a prudence inquiry.[6] The case, called "*NOPSI II*," originally sought to bar any Council inquiry into managemental prudence; it was later amended to seek only to bar any remedy affecting rates. It was dismissed on abstention and ripeness grounds by the district court in December 1986. The dismissal was affirmed on ripeness grounds in December 1987.[7]

The prudence inquiry went forward during 1986 and 1987, but did not delay a rate increase, which had been effected through settlement in March 1986, later described. In its prudence order (JA-10, *et seq.*, "the Rate Order"), the Council conformed its actions to the law, and on evidence of mismanagement and indifference that was overwhelming (JA-129-173), found NOPSI's management imprudent for having failed to pursue risk-reduction in the form of offsetting power sales that management had said it could make. The Council imposed a $135 million disallowance on this basis, "capped" at a level that NOPSI could "sustain" — *i.e.*, NOPSI could meet its Grand Gulf obligations, continue its operations, and return to financial health — and graduated its impact. (JA-210-211.) Aware of NOPSI's disposition to hold itself above state authorities, the Council commenced an action in state court seeking judicial review,[8] as did a citizens' group.[9]

NOPSI again shunned the state courts, and commenced this action in February 1988, seeking to enjoin the Council's order on preemption grounds,[10] and alleging irreparable harm (but not

[6] A prudence inquiry involves an examination of a utility's actions to determine whether management acted capably and reasonably under the circumstances prevailing and under decisional standards. (JA-42-52.) The established rule is that shareholders, not ratepayers, bear the costs of bad management. *See Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276 (1923).

[7] *New Orleans Pub. Serv. Inc. v. City of New Orleans*, 833 F.2d 583 (5th Cir. 1987), *aff'g Middle South Energy, Inc. and New Orleans Pub. Serv. Inc. v. City of New Orleans*, No. 85-5273 (E.D. La. Dec. 19, 1986) ("*NOPSI II*").

[8] *Boissiere v. New Orleans Pub. Serv. Inc.*, No. 88-2503 (La. Civ. Dist. Ct. filed Feb. 4, 1988).

[9] *Alliance for Affordable Energy, Inc. v. Council of New Orleans*, No. 88-2502 (La. Civ. Dist. Ct. filed Feb. 4, 1988).

[10] The complaint only refers to an impact on interstate commerce with reference to a finding in the Rate Order for which no remedy was imposed. (R.1 ¶ 38.)

"great and immediate harm" or "extraordinary circumstances") — a claim contrary to the Council's own conclusion, based on extensive evidence, that NOPSI could sustain the disallowance. (JA-173-184; JA-209-210). On the last day possible, NOPSI filed a state court suit that contained only state claims,[11] and it wrote to the court indicating that its real interest was to litigate in federal court. Only after the federal court abstained did NOPSI raise its federal claims in state court and seek an injunction. But it did *not* claim that it was suffering any irreparable harm, nor has it *ever* done so in state court.

NOPSI's state application for a preliminary injunction was denied; and that denial was affirmed by an intermediate appellate court on the ground that there was no attempt to demonstrate irreparable harm.[12] The case is now in state civil district court. Oral argument has been heard upon motions for judgment; and both parties have agreed to a post-argument briefing procedure. If abstention is maintained, NOPSI's federal and state claims will be reviewed in the state court system, and any remaining federal questions will be preserved for review by this Court, if necessary.

Most of the following facts are set forth with greater particularity in the Rate Order.[13] For convenience, relevant portions of the Rate Order are cited next to each caption.

There has been no claim that the Rate Order shifted costs to the ratepayers elsewhere, nor, on the evidence, could there be. *See* p. 34 *infra*.

[11] *New Orleans Pub. Serv. v. City of New Orleans*, No. 88-4511 (La. Civ. Dist. Ct. filed Mar. 7, 1988). NOPSI complained that the Rate Order is arbitrary, capricious and not supported by substantial evidence; applies an erroneous standard of prudence; breached the March 1986 settlement agreement; violated NOPSI's Louisiana due process rights; and constitutes an unlawful "taking."

[12] *New Orleans Pub. Serv. Inc. v. City of New Orleans*, No. 88-4511 (La. Civ. Dist. Ct. filed May 5, 1988), *aff'd*, No. 88-CA-1369 (La. Ct. App. Feb. 16, 1989). NOPSI had also sought expedited review. Its first request was denied since the record had not yet been lodged, but it does not appear that NOPSI made any effort to expedite the record. Later, NOPSI renewed its request, which was denied. NOPSI also sought extraordinary "supervisory writs" from the Louisiana Supreme Court to bypass the intermediate courts, but these were denied. It is not clear how NOPSI intended to make its need for expedition or extraordinary writs credible in the absence of a claim of irreparable harm.

[13] NOPSI does not challenge the accuracy of the findings of fact in the Rate Order. Challenges to such findings are fundamentally issues to be resolved by the state courts in review of a state administrative order. *Cf. University of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 484 n.26 (1982).

B. The Parties [JA-16-19]

The City of New Orleans is a Louisiana municipal corporation. Pursuant to Section 4-1604 of the Home Rule Charter, the Council is invested with "all powers of supervision, regulation and control over any" public utility within the city, and its regulatory power is recognized by the Louisiana Constitution of 1974. (JA-16.)[14]

NOPSI is an investor-owned utility engaged in the retail sale of electricity in New Orleans. NOPSI's rights and obligations with respect to electric service derive from the authorizations[15] of the Council, and its predecessor, that make regulation by the Council a predicate for NOPSI's right to collect rates. Ordinance No. 7068, enacted in 1922, authorized NOPSI "to charge and collect such fair and reasonable rates for electrical energy . . . as may be established by the City." (JA-18.)

NOPSI is a wholly-owned subsidiary of Middle South Utilities, Inc. ("MSU"), and is the smallest among the three other operating company subsidiaries — AP&L, LP&L and MP&L,[16] which provide electric service in neighboring regions. MSE (renamed SERI), is MSU's wholly-owned generation company which, during the relevant period, owned a 90% interest in Grand Gulf.[17]

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[14] With a brief exception, the Council has exercised regulatory jurisdiction over NOPSI since 1922. On November 23, 1981, pursuant to Ordinance No. 8264, a referendum caused regulatory authority over NOPSI to be transferred to the Louisiana Public Service Commission ("LPSC"). Such powers were returned to the Council in May 1985 pursuant to another referendum.

[15] The Council was empowered to issue a franchise and to regulate the utility pursuant to Article 14, Section 22, of the Louisiana Constitution of 1921 and by statute. La. Rev. Stat. Ann. § 33:4405.

[16] These names and terms have been previously defined or abbreviated in petitioner's brief.

[17] In December 1988, an 11.5% share of SERI's 90% share of Grand Gulf I was sold to investors and leased back.

C. Characteristics of the "System" [JA-62-63; JA-67-82]

The Middle South "system" operates as an electric power pool, in which the transmission facilities of the individual companies are interconnected. The generating units are centrally-dispatched and controlled. Decisions to build electric generation plants have been made based on the needs of all the operating companies. However, each generation plant has been built, owned and operated by each company individually — with the recent exception of Grand Gulf. Petitioner misportrays each operating company as sharing equally the total system power costs.[18] Rather, each operating company's decision in selecting power sources principally determines its costs, and there is, and has been, a disparity in total power costs among the companies. (JA-78.) NOPSI has had the highest costs on the "system" for almost 20 years. (*Id.*)[19]

D. Grand Gulf [JA-82-88]

NOPSI became involved in Grand Gulf in 1974 when it entered into the first of a series of agreements to guarantee certain

[18] Petitioner's brief redacts language in the *MP&L* decision, 108 S. Ct. at 2431, slip op. at 2, so as to say that the system agreements "*equaliz[e]* cost imbalances," (Pet. Br. at 5; emphasis added) which is not true, as described in the next footnote.

[19] The system agreements allocate responsibility to pay for and partially equalize *excess capacity* costs (along with a capacity entitlement), but they do *not* equalize the companies' total power costs. Moreover, the cost of all the power plants is not divided proportionately. Rather, a company pays *principally* for the plants *it* builds (or contracts for) and *may* at intervals pay for a portion of the *excess capacity* of certain plants built by others to the extent it is deemed "short" under the terms of the system agreement. The operation of the 1973 system agreement and the resulting costs are set forth at JA-73 to JA-80. Changes reflected in the 1982 system agreement are at JA-100. In the FERC's allocation decision there were some unclear and conflicting recitals regarding the terms of these agreements, and they, *inter alia*, are among the matters being considered in the appeal now pending elsewhere. (*See* n.21 *infra*.)

Also, petitioner quotes language of the *MP&L* decision to the effect that the 1982 System Agreement was "designed to ensure that each company contribute proportionately to the total costs of generating power on the system." (Pet. Br. at 5, n.5; *MP&L*, 108 S. Ct. at 2433, slip op. at 5.) That language, not necessary to the *MP&L* decision, does not accurately describe the system agreement, which allocates the cost of excess capacity to "short" companies, but does not prescribe "proportionate contributions" to the total cost of power. (*See* JA-73-77; JA-99-100.)

indebtedness for the construction of the plant and agreed to pay for indeterminate amounts of its output. (JA-85-88.) NOPSI did not seek authorization to enter into these agreements and did not, for six years, inform the Council of its commitments.

As construction of Grand Gulf went forward, certain events unfolded, summarized as follows. First, other companies, but not NOPSI, made commitments to diversify fuel supply through the acquisition of interests in coal-fired generation. (JA-88-91.) Second, the projected need of NOPSI and other companies for additional generating capacity decreased. (JA-81.) Third, nuclear plant construction costs increased sharply, driven primarily by concerns over safety. Moreover, new econometric studies revealed their real rate of increase to be even sharper. (JA-92-93.) Finally, in March 1979 an accident of unanticipated nature occurred at the Three Mile Island ("TMI") nuclear plant that precipitated a national inquiry and had major additional cost implications for the unfinished Grand Gulf project. (JA-94-95; JA-145-148.)

In January 1980, after the TMI incident, with the economics of Grand Gulf worsening, NOPSI's management inexplicably agreed to take a large fixed share of Grand Gulf (as well as of Grand Gulf II) — 29.8% of the MSE share, although NOPSI had only 9% of system load. (JA-95-100.) In 1985, the FERC found that NOPSI's management had agreed to an unreasonable share and reduced it to 17%.[20]

E. 1980 Hearings Before the Council [JA-101-102]

In May 1980, NOPSI sought Council approval of a "capacity adjustment clause" to authorize automatic pass-through of Grand Gulf costs when NOPSI began incurring them and informed the Council for the first time of NOPSI's obligations. NOPSI portrayed the proposal as enabling it to pass through "benefits" to the ratepayers. (JA-101.) Under oath, NOPSI's president, pressed regarding the supposed "benefits" and NOPSI's commit-

[20] *Middle South Energy, Inc.*, 31 FERC ¶ 61,305, *aff'd*, 32 FERC ¶ 61,425 (1985). New Orleans intervened in the FERC proceedings and contended successfully that the amount agreed to by NOPSI was improper, but unsuccessfully sought to have the amount set at 9%.

ting to the project without a public hearing, twice volunteered that NOPSI had the option of selling the capacity to other utilities:

> If it is in the wisdom of this Council that it is not appropriate for New Orleans Public Service to participate in this agreement . . . then NOPSI has the option of selling the capacity and marketing it which, we think will be a very attractive commodity to other electric utilities who will view this as very cheap, reliable power for the future.

(JA-102); and later in similar context, "[W]e will have the option of selling this unit and our portion of it to some other buyer." (*Id.*)

F. FERC Proceedings [JA-54-59; JA-103-109]

On June 18, 1982, SERI (*i.e.*, MSE) filed with the FERC the Unit Power Sales Agreement which reflected the shares of Grand Gulf cost responsibility to which the operating companies had agreed. (FERC No. ER82-616-000.) The issue posed was the proper allocation of cost responsibility. The prudence of the MSU companies' investing in, or the construction or completion of Grand Gulf was not raised. At the outset, Administrative Judge Liebman made clear that he did not intend to intrude upon possible retail issues regarding the responsibilities of the individual operating companies, twice stating, "I'm not getting into that," *Middle South Energy, Inc.*, FERC No. ER82-616-000, Transcript, Mar. 14, 1983 at 228 (*see* JA-56), and at the close of the dialogue, resisted being drawn into precluding state prudence reviews. *Id.* at 248 (JA-56-57). NOPSI did not participate in the proceeding until March 2, 1984, after the close of the hearings and evidentiary record.

A second case, No. ER82-483-000, was initiated on April 30, 1982 by the filing of the amended Middle South 1982 System Agreement that governs aspects of the planning of generation and transmission facilities and sales on the system. The issue posed was the allocation of the costs of generation. *Middle South Serv., Inc.*, 30 FERC ¶ 63,030, at 65,120 (1985).

The FERC issued a single order, Opinion No. 234 (later affirmed in Opinion No. 234-A), covering both cases. It held that the allocation of Grand Gulf costs agreed upon was unreasonable

and ordered a different allocation. As indicated, the 29.8% share agreed to by NOPSI was reduced to 17%. *Middle South Energy, Inc.*, 31 FERC ¶ 61,305, *aff'd*, 32 FERC ¶ 61,425 (1985).

Establishment of wholesale rates followed from the application of that formula to the costs of the project. The FERC declined to make a determination as to how such costs should be recovered in retail rates and did not order state regulators to refrain from conducting retail hearings and investigations. Instead, the FERC acknowledged the traditional role of the states in retail rate regulation, 31 FERC ¶ 61,305, at 61,951, and concluded that "the basic nature of regulatory control retained by the states under previous System Agreements remains unchanged." *Id.* at 61,952.[21]

The FERC's Acting Chairman confirmed in Congressional testimony that FERC did not determine any prudence issue relating to the operating companies and that:

> [T]he Commission has taken the position that the prudence of a party as the *purchaser* in an individual unit sale transaction is not generally within the scope of the issues considered in reviewing the rates and terms for the jurisdictional *sale* of power.[22]

G. NOPSI Rate Application and the Filing of "*NOPSI I*" [JA-27-29]

On May 17, 1985, two days after the Council reacquired regulatory authority from the LPSC (n.14 *supra*), NOPSI filed an application for a retail rate increase to reflect its Grand Gulf costs (JA-27). The Council promptly established filing requirements, and initiated proceedings to determine retail issues, including

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[21] The FERC's decision was appealed. The court remanded the case for reconsideration of the allocation issue. *See Mississippi Indus. v. FERC*, 822 F.2d 1104, 1105 (D.C. Cir.), *cert. denied*, 108 S. Ct. 500 (1987). On November 30, 1987, the FERC issued Opinion No. 292 in which it reaffirmed its prior allocation, *System Energy Resources, Inc.*, 41 FERC ¶ 61,238 (1987), which presently is on appeal to the District of Columbia Circuit. *City of New Orleans v. FERC*, No. 88-1062 (D.C. Cir. filed Jan. 29, 1988).

[22] *Powerplant Costs: Hearing Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 21 (1986) (statement of Anthony Sousa, Acting Chairman, FERC).

phase-in plans, other forms of rate moderation, allocation among customer classes, and, later, prudence. (JA-21.) To deal with financial needs during its deliberations, the Council on July 25, 1985 invited NOPSI to file for interim rate relief. (JA-27.)

NOPSI sought no such interim relief, but instead commenced *NOPSI I* on August 1, 1985, seeking an immediate cost pass-through and damages of $1 billion from the Council members. The district court took testimony regarding supposed irreparable injury, but rejected NOPSI's position and directed NOPSI to seek interim rate relief from the Council. NOPSI did so on August 19, 1985. The government's brief states that the Council "denied NOPSI's request for interim rate relief" (p. 5), but this is misleading. On September 5, 1985, the Council passed Resolution R-85-526 (a) granting NOPSI $28.3 million in interim relief; (b) providing for recovery of full relief, as finally determined, for the period of deliberation; and (c) inviting NOPSI to seek additional interim relief as necessary. The Council determined that NOPSI would be maintained in a positive cash position through March 1986. (JA-28.) NOPSI never sought additional interim relief. After *NOPSI I* was dismissed on September 16, 1985, NOPSI made a partial submission of its refiled application on September 30, 1985, two weeks overdue, and completed its submission on October 11, 1985. (JA-28-29.)

The Court of Appeals initially reversed the district court, 782 F.2d 1236, but withheld its mandate, requested further briefing, and on September 2, 1986, concluded that "the district court's decision to abstain on the instant facts was a proper exercise of discretion." 798 F.2d 858, 864. It stated:

> [T]he regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise. The regulatory scheme is complex. In addition, the Louisiana state courts are fully able to address NOPSI's complaints about Council actions: appeals from Council orders are to be filed with the Civil District Court for the Parish of Orleans. Significantly, NOPSI has not denied that adequate state court remedies exist. That the state courts often capably address claims such as that raised by

> NOPSI is apparent from the number of state court cases upon which NOPSI relies to prove its preemption claim substantial. Nor would federal abstention foreclose the United States Supreme Court from entertaining NOPSI's preemption claim should it wind its way up through the state courts, as is demonstrated by the path of the recent *Nantahala* case.

Id. at 862. NOPSI's petition for *certiorari* was denied. 481 U.S. 1023 (1987).

H. Initiation of the Prudence Proceeding and "*NOPSI II*" [JA-29-32]

On October 10, 1985, the Council initiated an investigation of NOPSI's prudence with respect to Grand Gulf I as a part of the rate proceeding. (Res. No. R-85-636.) The resolution proposed to investigate several aspects of NOPSI's relationship to Grand Gulf "for the purpose of determining what portion, if any, of NOPSI's Grand Gulf I expense shall be assumed by its shareholders," including, *inter alia*, NOPSI's "efforts to minimize its total cost exposure for the purchase," and Grand Gulf's "impact on its other power supply opportunities." It declared that, "The Council will not seek to invalidate any of the agreements surrounding Grand Gulf 1 or to order NOPSI to pay MSE a rate other than that approved by the FERC." Res. No. 85-636 at 4. (JA-113-114.)

Although the resolution requested that NOPSI respond to evidentiary questions by November 18, 1985, NOPSI did not respond or discuss any concerns. (JA-29.) Instead, it initiated its "*NOPSI II*" action against the Council on November 14, 1985, which was dismissed as previously described (*supra* at p. 3).[23]

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[23] Regrettably, petitioner incorrectly asserts that the Council's order disallowing $135 million "violated its representation in the Fifth Circuit in *NOPSI II*" (*see* Pet. Br. at 9), improperly taking advantage of a verb tense error in that court's opinion, which stated that the Council represented in oral argument that it "was looking into the possibility that NOPSI could make 'off-system' sales," 833 F.2d at 586; whereas, in fact, it had stated that it was looking into such sales in the 1979-80 period. Motions by both parties ensued and respondent noted that its position be verified by reference to its brief, the official recording of argument and a press account. NOPSI seemingly conceded that the court's opinion might be corrected "as perhaps it should be." NOPSI's Memorandum in Response to Motion to Amend or Correct Judgment, January 7, 1988 at 4. The Fifth Circuit

I. Settlement of the Rate Case

On March 20, 1986, after the Fifth Circuit's first decision in *NOPSI I* was rendered, the Council and NOPSI reached a settlement, embodied in Council Resolution R-86-112. The settlement provided, *inter alia*, that NOPSI's shareholders would absorb $51.2 million of Grand Gulf costs and that all the remaining costs would be passed on to retail ratepayers under a "phase in" plan of 8 or 9 years designed to moderate the adverse effects of "rate shock." The Settlement Resolution provided that the Council could continue its prudence investigation. (JA-185.)

Petitioner recites that "[t]o obtain any rate relief at all," it was "*forced* to agree to a settlement" (Pet. Br. at 3) (emphasis added), but this is utterly untenable. Petitioner fails to mention, *inter alia*, that the Council had provided, and offered further, interim relief to NOPSI; that the district court had found that the Council was trying to maintain NOPSI in a positive cash position; that *all* the other operating companies reached local settlements involving phase-ins and, in the case of the two largest companies, major cost absorptions;[24] that NOPSI itself proposed the settlement and that NOPSI's President at a public hearing complimented the Council on the settlement efforts (Council No. CD85-1, Transcript, Mar. 20, 1986 at 7-8); and that the prudence inquiry did not delay the settlement or the rate increase, but rather was left to follow its own course. (JA-185.) NOPSI has never challenged the propriety of the settlement in any legal action.

J. The Prudence Inquiry

The prudence inquiry was conducted in three parts. The first, dealing primarily with substantive questions, involved numerous depositions followed by the submission of testimony in March 1986 and evidentiary hearings in April 1986. (JA-22.) In May 1986, the Council set additional discovery, testimony and hearings for the

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declined NOPSI's motion to rehear and did not amend its opinion. By abstaining in *NOPSI III*, the Fifth Circuit indicated that there was no basis to NOPSI's claim that *NOPSI II*'s dismissal was based on any unfulfilled representation by the Council.

[24] (*See* JA-53 n.31.) AP&L absorbed 20% of its Grand Gulf costs. LP&L agreed to absorb 18% of such costs. It is *not* necessarily in a utility's best interest that all costs be passed through. *See* n.4 *supra*.

second phase, regarding the economic impact of possible remedies if imprudence were ultimately found. (*Id.*) These were held in October 1986. The passage of the Tax Reform Act required a third phase for reconsideration of economic issues, and a special hearing for this purpose, after additional discovery, was held in February 1987. (JA-22.) The Hearing Examiner transmitted the certified record to the Council on April 16, 1987. (*Id.*)

K. The Rate Order and "*NOPSI III*"

After deliberation, public hearings and unfruitful settlement discussions with NOPSI (JA-22), the Council issued its Rate Order on February 4, 1988,[25] reducing NOPSI's aggregate rate increase over time to reflect a disallowance of $135 million (JA-209-212),[26] which was based on overwhelming evidence of managemental indifference and reflected management's failure to realize offsetting sales of power. The Rate Order did not alter the FERC's allocation to NOPSI for any purpose (JA-23) and did not shift Grand Gulf costs to ratepayers elsewhere. The Council limited the disallowance and implemented it gradually, in the form of reduced rate increases over time. (JA-211.) The Rate Order also addressed the preemption arguments raised by NOPSI there and determined that a number of areas were beyond its jurisdiction, but that risk reduction at the retail level was not. (JA-52-61; JA-122; JA-175.)

NOPSI immediately commenced this action. The district court, noting that this was NOPSI's "third trip to this court," abstained, stating:

> The Rate Order does not ostensibly question NOPSI's FERC-allocated Grand Gulf I costs . . . . Rather, the

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[25] NOPSI's brief improperly implies that the Council waited for the Fifth Circuit's decision in *NOPSI II* before issuing its Rate Order (Pet. Br. at 9 n.12). In fact, the Council withheld decision because it and NOPSI were engaged in settlement negotiations which continued into 1988. (JA-22.) These matters are reflected in correspondence with NOPSI that can be lodged with the Court if necessary. Also, a draft order had been prepared in October 1987, but it was not adopted. There were numerous modifications before an order was issued by the Council in February 1988.

[26] The government inaccurately states that $135 million was ordered deducted from NOPSI's "rate base." (Gov't Br. at 8.) Grand Gulf involves purchased power and is not a "rate base" item.

> Council determined that as a result of NOPSI's deficient and uncritical oversight of the Grand Gulf I project and its failure to realistically assess its heightened risk exposure in the wake of the Three-Mile Island incident, NOPSI imprudently failed to reduce the risk of its Grand Gulf commitment in 1979 and 1980 by selling a portion of its share of the nuclear power off-system and further did not even attempt to ascertain whether off-system sales could be accomplished notwithstanding its President's assurances to the Council that such sales were possible.

(Cert. App. 24A.)

* * *

> Exercise of jurisdiction at this stage would preclude the state court from assessing and formulating state policy .... [T]he Council's Rate Order is subject to review in Louisiana state court .... Unlike NOPSI, this court does not believe that the Louisiana courts will dispose of federal issues 'from a biased perspective.'

(*Id.* at 27A-28A.)

The Fifth Circuit affirmed on grounds detailed in argument *infra*. NOPSI's petition for *certiorari* followed. The state court actions have previously been described.

SUMMARY OF ARGUMENT

The district court was entirely correct in abstaining from exercising jurisdiction to enjoin a state utility rate order that involved clear state interests of the "most important" kind and a lawful state effort to address rates and practices within its jurisdiction. The state had a right to attempt to explore and define the responsibility of prudent utility management to pursue options available to it to reduce power supply risks, free of disruptive federal litigation, where the alleged federal limitation raised a debate in complicated circumstances over what implied preemptive effects should be imputed to a FERC order. While petitioner and the government press the Court to decide prematurely that the regulator's action had been categorically preempted here, no

state court has provided an authoritative ruling on the regulatory matter in question; and no court, state or federal, reviewing this matter has shared petitioner's view of the nature of the preemption issue. This Court should not be drawn into making a substantive preemption decision without requiring the very process of mediation and development by the state courts that its own abstention decisions require.

Petitioner refused to take its case to the state courts, though explicitly directed years ago to do so, with the result that the "delays" and the implausible "irreparable injury" of which petitioner complains are self-inflicted. To this day, petitioner has not raised any claim of irreparable injury in a state court; it is incredible that any company actually suffering irreparable injury would fail to do so. Instead, petitioner spent its efforts successfully to drain state regulatory resources and to disrupt state regulatory review by filing three federal lawsuits and 20 motions.

Were the Court to become entangled in the preemption issue prematurely, or to allow petitioner to ignore the state courts, it would rip a gaping hole in its own abstention doctrine as established in the *Younger-Huffman-Pennzoil* and *Burford* lines of cases. It would create a special access rule for electric utilities even though, for at least half a century, *every* act of Congress in this area — the Federal Power Act; the Public Utility Holding Company Act; the Anti-Injunction Act; and the Johnson Act — has been aimed at *protecting* state regulatory jurisdiction and *curtailing* utilities' attempts to use the lower federal courts to interfere with state regulation.

Here, *every* requirement of this Court's established abstention tests was met and exceeded: (1) state court actions were actually pending; (2) state utility regulation is one of the "most important," "sensitive," and "paramount" local concerns; (3) the opportunity to raise federal challenges in state proceedings was uncontested; and (4) the proceeding involved the very archetype of a complex regulatory system. Even if the Council's regulatory order were erroneous, the state maintained an important interest in developing its own system of review and making its own regulatory institutions responsible, instead of being superintended by the lower federal courts. Moreover, there are very substantial

efficiencies here in channeling review through the state system, including avoidance of the duplication and "churning" that results when there are two litigation tracks that the utility can use to disrupt state regulation.

Petitioner's and the government's arguments rest on the biased premise that the federal courts will act *faster* and *righter* than the state courts — which cannot withstand scrutiny and is contradicted by empirical evidence. The government's argument that the state courts cannot be relied upon in "multistate" disputes is irrelevant, since this is not a multistate dispute, and the argument is otherwise insupportable.

Petitioner has virtually no support in the case law, which, with near uniformity, supports the rule that if abstention is otherwise required, as here, a federal court may refuse to abstain only when (1) preemption is "facial" or "readily apparent"; or (2) the state has established authoritative, unambiguous policy on the very matter in issue. Even then, federal interference is not *required* because "facial invalidity" is not itself an "exceptional circumstance" justifying interference. There are other sound reasons to allow a state to "set its own house in order," particularly in an area as sensitive as local utility regulation.

Petitioner's arguments rest upon a gross misportrayal of the Federal Power Act, which was extremely protective of state regulation and was passed only after revisions "removed every encroachment upon the authority of the states" and added language to "prevent the expansion of federal authority." Under established tests, there was no preemption here — much less the "facial" or "readily apparent" variety necessary to justify interference. The Council acted in an area which Congress did not either specifically preempt or occupy as a field, and the issue thus requires a plenary "conflict-pre-emption analysis." This analysis must be applied "sensitively" in order to "prevent the diminution of the role Congress reserved to the states." This approach alone presents a compelling case for deference to state courts.

Even if further analysis were appropriate, there is no ostensible preemption. The Rate Order sets only retail rates; accepts as a "given" the FERC-allocated share; imposes a disallowance only on the basis of management's failure to realize savings

through other transactions; does not stand as an obstacle to the FERC's allocation of plant costs or the utility's payment of them; and passes no costs to the ratepayers of other states. It rests on overwhelming evidence of bad management at the retail level, and there is no federal purpose to insulate utility investors from the risks of such management.

NOPSI's reliance on the *Nantahala* and *MP&L* cases is misplaced. In both cases, the local regulator sought to alter the FERC's allocation to the utility for purposes of retail ratemaking. Both cases, in addition, turned on the fact that the utility had virtually no choice with respect to the power costs in issue. Here, however, petitioner had the option to pursue other transactions of the kind that it told the Council it could make, as established by the evidence. Moreover, the issue of management's prudence in this instance could not have been litigated at the FERC.

The merits of NOPSI's preemption claim are now before the state court, and the record there includes new arguments by NOPSI regarding preemption never made in the courts below. The entire case should be decided in state courts, without further disruption through collateral federal proceedings, before this Court is called upon to act, if there is need that it do so.

ARGUMENT

I. ABSTENTION WAS REQUIRED UNDER ESTABLISHED PRINCIPLES

A. The Tests Established by This Court Compelled Abstention Here

Petitioner's "Question Presented" misportrays this case when it asks whether abstention was appropriate where "explicit orders" of the FERC preempted local authorities from determining "the very matters FERC has decided." (Pet. Br. at i.) There is nothing "explicit" in the FERC's orders that addressed or "decided" an operating company management's prudence for failure to make use of available risk-reduction measures. Instead, this case involves *clear* state interests, a debate over what implied effects should be imputed to a FERC order, and the question

whether to encourage a duplicative litigation track designed to disrupt state proceedings.

Louisiana has an undeniable substantive interest in regulating the rates and practices of domestic utilities. That interest was expressed here, at the regulatory level, in the principle that prudent management may not "sit on its hands" in relation to the growing risk of a power commitment when there where other options available. Petitioner argues that the FERC's order preemptively stripped management of any such responsibility, and, as a corollary, that the retail regulator is powerless, whatever the facts, to act in such a situation.

Petitioner's extensive preemption argument, however, gets well ahead of the issue here — whether the Court should undermine its own abstention cases by undertaking a complicated preemption review without requiring that the case be first developed in the state adjudicatory system. The issue is here without *any* state court decision on the merits. This situation has arisen because, despite this Court's decisions and federal court rulings addressed specifically to petitioner, it is determined to hold itself above state authority and to use the federal courts to disrupt state review. The alleged "delays" that NOPSI deplores here are self-inflicted. Similarly, NOPSI's implausible claim that it is suffering "irreparable injury" has not been squarely adjudicated because NOPSI has refused to raise the issue in state court, which is entirely capable of responding to any urgent need for relief. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987).

To credit petitioner's position would rip a hole in a virtually unbroken line of decisions underscoring the importance of a federal court's abstaining from interfering with the state adjudicatory system, *especially* when it is claimed that federal constitutional or statutory limitations preclude state action.[27] The abstention doctrines are not "rigid pigeonholes into which federal courts must try to fit cases," but rather reflect a "complex of considerations" designed to "soften the tensions inherent" in the

[27] Indeed, in instances where there is *no* clash between federal statutory or constitutional interests and state interests, such as when a federal court decides state law issues in the exercise of its diversity jurisdiction, there is ordinarily *no* basis for abstention. *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 187-89 (1959).

federal-state system. *Pennzoil*, 481 U.S. at 12 n.9, and they rest upon either "comity" *or* the avoidance of unnecessary or "advisory" constitutional determinations. *Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 479 (1977).

The core of "comity" is "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). It envisions a sensitivity to, and mediation of, the legitimate interests of *both* State and National Governments. The insistence of the Court that these principles be followed is reflected in the language that:

> [I]t has been perfectly natural for our cases to repeat time and time again that the *normal* thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions.

Id. at 45 (emphasis added), and this language has itself been regularly repeated. *See, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 627 (1986). It is basic that state courts can be relied upon, equally with the lower federal courts, to decide federal issues impinging upon state interests. *Steffel v. Thompson*, 415 U.S. 452 (1974).

The principal doctrine founded on comity is that expressed in *Younger* and its progeny, particularly *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), and *Pennzoil*, which reflect "strong policies counseling against the exercise of '. . . jurisdiction," *Ohio Civil Rights Comm'n*, 477 U.S. at 626, and *require* abstention if the following factors are present: (1) there is an "on-going state judicial proceeding," a phrase which includes an administrative proceeding subject to state judicial review; (2) the proceeding implicates an important state interest; and (3) there is an adequate opportunity in the state proceedings to raise federally-based challenges. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). The court is required to abstain unless (a) there is a specific showing of bad faith or harassment; (b) the case turns on an unsalvageably invalid state statute;[28] or (c) there

[28] The statute must be entirely incapable of being applied consistently with federal law, under any circumstances. *Watson v. Buck*, 313 U.S. 387, 400-02 (1941).

are "extraordinary circumstances" — *i.e.*, those that "render the state court incapable of fairly and fully adjudicating the federal issues before it." *Moore v. Sims*, 442 U.S. 415, 433 (1979) (quoting *Kugler v. Helfant*, 421 U.S. 112, 124-25 (1975)). None of these exceptions is present here.

The *Burford*[29] doctrine is a special case of comity-based abstention that applies when a complex state regulatory matter is involved and the state adjudicatory system is open to federal claims. The presence of a complex regulatory scheme makes it probable that federal interference would disrupt the development of a reasoned solution and state regulatory law.[30] Abstention is required even if no state proceeding has been initiated, and even if there is no state law "question" framed as such. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814-15 (1976). State utility regulation is the archetype of a complex regulatory system, and its presence implicates the *Burford* doctrine, even when, as here, *Younger* is also fully applicable.[31]

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[29] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

[30] Petitioner contends that *Burford* requires that there be a specialized state court for review of regulatory decisions. (NOPSI Br. at 26 n.28.) In applying *Burford*, the courts of appeals generally have not deemed this circumstance to constitute a requirement. *See, e.g., Corcoran v. Andra Ins. Co.*, 842 F.2d 31 (2d Cir. 1988); *Meredith v. Talbot County*, 828 F.2d 228 (4th Cir. 1987); *Robert-Gay Energy Enter. v. State Corp. Comm'n*, 753 F.2d 857 (10th Cir. 1985); *Browning-Ferris, Inc. v. Baltimore County*, 774 F.2d 77 (4th Cir. 1985).

[31] *See, e.g., Aluminum Co. of Am. v. Utilities Comm'n*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984). The government (Gov't Br. at 21 n.15) would apparently have a different abstention rule apply where the state ratemaking agency is elected. A good number of state utility commissions are elected; others are appointed by the governor, some with and some without legislative concurrence, all with limited terms. No different abstention rules should apply, any more than to state courts, which are both elected and appointed.

The government also suggests that this Court should show "concern" because the Council has also been negotiating with NOPSI toward possible municipalization of electric supply, a legitimate local function and hardly a basis for the imputation of bias. Suggestions of so serious a nature are inappropriate for appellate footnotes; bias must be proved. *Gibson v. Berryhill*, 411 U.S. 564 (1973). If the Council's findings are not supported by the evidence, there is a state court remedy for it.

In the instant case, the requirements of each doctrine are met and exceeded: (1) the establishment of local utility rates and policies is a very "sensitive" matter of extreme local concern;[32] (2) there are pending state proceedings; *both* the state court suits themselves and the Council's completed regulatory proceeding meet this test because there was an opportunity to seek state court review of the latter proceeding;[33] (3) petitioner's federal claims can be raised and adjudicated in the Louisiana courts;[34] and (4) state utility regulation is the very model of complex and specialized regulation.[35]

State court review here was clearly the appropriate path. The state had an interest in developing an authoritative statement of regulatory law. This might result in reshaping the responsibility of utility managers with respect to risk reduction, a different remedy, different proof requirements, or a declaration that there is no responsibility at all. The very fact that the FERC set binding allocations presented the problem of how the state should deal with legitimate local concerns, including utility accountability and risk-management practices, in a difficult situation. The state should be given the opportunity to "mediate" competing state and

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[32] It is "one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). "[T]he regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise." *NOPSI I*, 798 F.2d at 862; "[A] state's regulation of its public utilities is a sensitive area of social policy into which a federal court should not intrude unnecessarily." *International Bhd. of Elec. Workers v. Public Serv. Comm'n*, 614 F.2d 206, 212 (9th Cir. 1980).

[33] *Huffman v. Pursue, Ltd.*, 420 U.S. at 607; *see Middlesex County Ethics Comm.*, 457 U.S. 423.

[34] This is uncontested, and state court suits encompassing NOPSI's federal claims are pending. Pursuant to Section 4-1604 of the New Orleans Home Rule Charter, appeal lies from an order of the Council. Articles 3601 and 3602 of the Louisiana Code of Civil Procedure provide for rapid hearings on injunctions.

[35] Here, for example, both the analyses of the costs of alternative power sources and the nature of the options available to NOPSI at particular points in time, issues basic to the prudence inquiry, are complex matters that involve specialized expertise. (*See, e.g.*, JA-156-159.) Moreover, the development of possible remedies for imprudence involved complex economic and rate analyses peculiar to utility regulation. (*See, e.g.*, JA-179-209.)

federal interests here and not be prevented from the "informed evolution of state policy." *Moore v. Sims*, 442 U.S. at 429; *Trainor v. Hernandez*, 431 U.S. at 445. Moreover, abstention would avoid confronting, as a basis for decision, the lowest echelon expression of state "policy," and it removes all doubts about what the state would and could do if permitted to act.

Abstention here would also permit an authoritative review of the state administrative record (under state rules requiring evidential support and rational judgments), in light of state policy and other state issues, at the same time and in the same forum that the federal claims are being considered. This is far more efficient, less disruptive, and avoids the problem faced here (*see* Pet. Br. at 11-12) of the utility's denigrating the substance of the state's decision under the pretense of arguing jurisdiction.

It is important to discourage two litigation tracks. Otherwise, it is inevitable that utilities will strain to involve the lower federal courts. The state then faces the duplicative task of trying to implement its own policies while fighting federal litigation, *see Trainor*, 431 U.S. at 445, with disruption and wasted motion. This dispute alone resulted in *three* separate federal lawsuits filed by NOPSI. The Council has responded to *twenty* separate federal motions – for, *e.g.*, expedition, interim relief, rehearings and withdrawal of mandates, all of which have consumed both regulatory and judicial resources; most of which were denied; and some of which NOPSI must concede to have been of questionable merit[36] – as well as to state applications. The utility can thus "churn" litigation as a means of depleting regulatory resources.

Federal interference also undermines the state's interest in developing a system of review competent to vindicate federal rights arising in matters involving its own regulatory bodies, *see Huffman* , 420 U.S. at 592, 604, 609; *Juidice v. Vail*, 430 U.S. 327, 335 (1977), and it reflects negatively on the state, damaging the development of responsibility and accountability within the state system. *Trainor*, 431 U.S. at 445-446.

[36] For example, petitioner now apparently concedes that it was a "legitimate state retail ratemaking function" for the Council to hold proceedings on rate moderation issues such as the phasing-in of Grand Gulf expenses (Pet. Br. at 27), while in *NOPSI I* it had contended it was entitled to an immediate and full pass-through of such expenses.

Petitioner's and the government's urgings as to the need to "vindicate" federal rights and avoid "delay" and "harm" rest precisely on the biased, negative premise that lower federal courts will act *faster* and *righter* than state courts, which is unsupportable. State courts originally were relied upon exclusively to hear these federal matters, and have shared jurisdiction co-equally with the lower federal courts since 1875. *See Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 355 (1951) (Frankfurter, J., concurring). The state courts have shown themselves responsible in overturning the actions of state regulators on the basis of federal statutory and constitutional limitations.[37] They have, in fact, been responsible for the development of the "*Narragansett* Rule," the chief preemption doctrine in utility rate law.[38] The Louisiana courts in particular have acted responsibly in enforcing federal law in the regulatory area,[39] and have otherwise exercised close supervision of state utility regulators.[40]

These real-world facts wholly undercut the government's declaration that "federal preemption claims" turn solely on an "understanding of a complex federal regulatory scheme," and do

[37] *See, e.g., Washington Gas Light Co. v. Public Serv. Comm'n*, 508 A.2d 930, 936 (App. D.C. 1986); *Northern States Power Co. v. Minnesota Pub. Util. Comm'n*, 344 N.W.2d 374, 378 (Minn.), *cert. denied*, 467 U.S. 1256 (1984); *Eastern Edison Co. v. Department of Pub. Util.*, 446 N.E.2d 684, 689 (Mass. 1983); *Northern States Power Co. v. Hagen*, 314 N.W.2d 32, 38 (N.D. 1981); *United Gas Corp. v. Mississippi Pub. Serv. Comm'n*, 127 So. 2d 404, 420 (Miss. 1961).

[38] *Narragansett Elec. Co. v. Burke*, 381 A.2d 1358, 1362 (R.I. 1977), *cert. denied*, 435 U.S. 972 (1978); *Chicago v. Illinois Commerce Comm'n*, 150 N.E.2d 776, 781 (Ill. 1958); *Citizens Gas Users Ass'n v. Public Util. Comm'n*, 138 N.E.2d 383, 384 (Ohio 1956); *see also* cases cited *supra* note 37.

[39] *See, e.g., Louisiana-Nevada Transit Co. v. Fontenot*, 97 So. 2d 411, 414 (La. 1957) (state tax on interstate natural gas); *Louisiana Power & Light v. Louisiana Pub. Serv. Comm'n*, No. 292,026 (La. Civ. Dist. Ct. Oct. 9, 1985) (reversing failure to recognize FERC-approved costs); *Neuss, Hesslein & Co. v. Louisville & N. Ry. Co.*, 59 So. 2d 195, 198 (La. 1952); *Smith v. Delta Express, Inc.*, 359 So. 2d 1066, 1068 (La. Ct. App. 1978); *Bohrer Chem. Co. v. SAIA Motor Freight Lines*, 227 So. 2d 650, 651 (La. Ct. App. 1969); *Crowley Indus. Bag Co. v. Western Union Co.*, 204 So. 2d 725 (La. Ct. App.), *cert. denied*, 206 So. 2d 711 (1968).

[40] *See, e.g., Gulf States Util. Co. v. Louisiana Pub. Serv. Comm'n*, No. 325,224 (La. Civ. Dist. Ct. Feb. 18, 1988) (requiring LPSC to provide higher return to protect utility's financial stability).

not "present appropriate occasions for deference to state tribunals." (Gov't Br. at 22.) In addition, resolution of preemption claims in the electric utility area will depend on an understanding of *both* federal and state regulatory interests, including a complex *state* regulatory scheme, and the opportunity for "mediation" of the two.

There is more empirical evidence that refutes the government's bias. A recent comprehensive treatise on American constitutional law cites 48 important cases of this Court on preemption. Not only did *most* cases (26) follow a *state court path* to this Court, but also the state courts did *slightly better* (50% to 47%) than the lower federal courts in reaching the correct outcome on the issue of preemption.[41]

The government also urges that comity be discounted here because, it says, this is a "multistate" dispute, implying that bias will prevail because "a decision . . . of any one state . . . may have a corresponding direct adverse effect on" other states. (Gov't Br. at 20-21.) But this is *not* a multistate dispute; no other states have intervened; none has filed as *amicus* against respondent; the Rate Order did *not* shift costs to their ratepayers; the Council's remedy here was moderated so as to avoid even indirect effects. (JA-209-211.) Indeed, there are not even *substantive* recitals of adverse impact on other states' ratepayers in the complaint or in any of NOPSI's affidavits. (*See* n.3 *supra*.) Even if this *were* a multistate dispute, it would be just as important to give a state the opportunity to develop policy against the background of other states' interests as when other federal constraints are involved. The state courts should not be deemed less competent to interpret state policy or federal law because the Commerce Clause is involved, nor biased in doing so.

B. Petitioner Has No Support in the Case Law

Petitioner's discussion of abstention law gets off on the wrong foot by misportraying the opinion of the Fifth Circuit as "correctly" assuming "that the Council had no legitimate interest in the

[41] All preemption cases cited at pages 479-511 in Chapter 6 of Tribe, *American Constitutional Law* (2d ed. 1988) were reviewed to determine the lower court path and how the result reached compared to this Court's determination.

prudence investigation; that its Order is 'beyond the Council's . . . authority.'" (Pet. Br. at 3.) Instead, the Fifth Circuit said it would "assume" that the district court "thought" that it should abstain "*even if NOPSI were able to prove, as it alleges*," with "some" apparent evidential support, that the Rate Order improperly traps costs, was based upon factors that the state could not consider, and consequently was beyond the Council's authority. 850 F.2d at 1075; Cert. App. 11A (emphasis added).[42] Thus corrected, it is clear that the alleged preemption was *not* viewed as proven, "facial" or "readily apparent."[43]

This has been a pivotal distinction. All cases relied upon by petitioner can be reconciled by the rule that a federal court may refuse to abstain when (1) preemption is facial, direct or "readily apparent" and, of course, dispositive; *or* when (2) the state has already taken authoritative and unambiguous action on the very matter in issue. If either circumstance were present, deference to the state court would serve a diminished purpose — although such a determination should be made with great care, and there still would be a basis for discretion to abstain.[44]

In *Public Utility Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943), upon which petitioner principally relies (Pet.

[42] Also, the Fifth Circuit did not say that the Council had no "legitimate interests" here. The Council and the state have compelling interests. NOPSI uses the quoted phrase to get extra mileage out of its circular and overly broad argument that if the state's substantive law is constrained by preemption, none of its interests are "legitimate."

[43] The Fifth Circuit also noted at another point that the facts of this case were different from the facts of *MP&L* (indeed, the factual differences are even greater than noted by the Fifth Circuit), but it apprehended that the language in the *MP&L* decision, though addressing a different set of facts, was broader. 850 F.2d at 1076; Cert. App. 13A.

[44] The Court has stated that the "*facial invalidity* of a statute *is not itself* an exceptional circumstance justifying federal interference with state criminal proceedings." *Huffman*, 420 U.S. at 602 (emphasis added). Even where there is apparent preemption, the state still would have an institutional interest in "setting its own house in order," through appellate review of its administrative agencies, whether or not an initial administrative order is determined to be erroneous — particularly in the area of utility regulation where the state has undeniable interests. *See id.* at 604 (state has institutional interest in overseeing trial court disposition of constitutional issues).

Br. at 24, 26, 32, 35), the state utility commission sought to set the rate for the *inter*state sale of gas from wholesaler to retailer — an act unquestionably beyond its authority, directly in conflict with the Natural Gas Act's grant to the Federal Power Commission of exclusive authority over such rates. *Id.* at 466-68. The *only* additional issue was whether the state would have been preempted *before* the Act was passed; but the Court did not reach the issue because the order, read in consonance with state law, did not assert jurisdiction to fix the rates during that period. *Id.* at 468. Even so, the Court stated that in "ordinary circumstances" it would have *abstained*, but noted the exceptional factor that the case had "already been too long in the federal courts" (*id.* at 462) — for *eight years*. *Id.* at 460 n.2.

Similarly, in *Public Utility Commission of California v. United States*, 355 U.S. 534 (1958) (Pet. Br. at 18, 24, 25), the "only question" was whether the state could constitutionally force the United States to submit to prior state review of its common carrier contracts, and the Court held that it was the "very essence" of supremacy that the state could not. *Id.* at 540, 544.

Identical analytically is *City of Chicago v. Atchison, T.& S.F. Ry. Co.*, 357 U.S. 77 (1958) (Pet. Br. at 24), where the city enacted an ordinance requiring the operator of transfer services in *inter*state commerce to seek a business license. Because the Interstate Commerce Act "authorized, if not actually required," the transfer services, 357 U.S. at 86, the Court found that the city was powerless to exercise such licensure. Abstention was urged only to determine that the ordinance applied to the particular operator. The Court declined to defer because the ordinance was virtually designed to apply to the operator; the city itself contended that it did; and there was no ambiguity. 357 U.S. at 80, 84.

An example of the second situation (where the state has already decided the matter in question) is found in *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145 (1988), upon which NOPSI had relied in its petition for *certiorari* (Pet. at 10). There, the Court held that a Michigan statute requiring state approval of an interstate gas transportation company's securities issuance was preempted by the Natural Gas Act. Abstention was unnecessary because the state supreme court had already decided the matter

in question; in fact, *certiorari* was granted because of the conflict between the state decision and a federal one. 108 S. Ct. at 1150.

The lower court decisions cited by NOPSI are entirely consistent with decisional principles noted above. *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404, 408, 411 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986) (abstention inappropriate where the state commission proposed to void the very contract and allocation approved by FERC); *Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111, 1113, 1114, 1118 (3d Cir. 1986) (no abstention; state policy already articulated by all three branches of the Pennsylvania government);[45] *American Elec. Power Co. v. Kentucky Pub. Serv. Comm'n*, 787 F.2d 588 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987) (three separate opinions supporting abstention; issue was whether a utility, part of a multistate system, acted prudently in purchasing power from a higher-priced power pool; utility insisted that an interstate agreement required it to discontinue pool purchases and that the state could not even interpret the agreement); *Baggett v. Department of Professional Regulation*, 717 F.2d 521 (11th Cir. 1983) (no abstention where state proposed a disciplinary hearing regarding a marine pilot on an "enrolled vessel" within *exclusive* federal jurisdiction); *International Bhd. of Elec. Workers v. Public Serv. Comm'n*, 614 F.2d 206 (9th Cir. 1980) (petitioner omits to state that although abstention under *Burford* was denied, abstention under *Pullman* was upheld; authoritative analysis of state law was sought).

Two Fourth Circuit cases show how the decisional rules noted above are practically administered. In *Aluminum Co. of America v. Utilities Commission*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), the court upheld abstention where, as here, the state commission had acted and the state courts were involved in review. 713 F.2d at 1029. The court held that to justify federal intervention, "whether the challenged state action con-

[45] State action was later found *not* preempted, *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n*, 837 F.2d 600 (3d Cir.), *cert. denied*, 109 S. Ct. 365 (1988), but the state had been required to litigate the issue through the federal court system, and even further federal court litigation, encouraged by the initial decision not to abstain, has ensued.

flicts with federal law must be *readily discernable* from the pleadings" so that it can be determined that it "*clearly conflicts*" with "preemptive federal law." *Id.* at 1030 (emphasis added).[46] In contrast, the court ruled in *Appalachian Power Co. v. Public Service Commission*, 812 F.2d 898 (4th Cir. 1987), that abstention was unnecessary with regard to a state prudence inquiry involving an interstate transmission agreement where the inquiry involved the *identical* issues determined by the FERC — specifically noting the "identity of the inquiries" (*id.* at 904), FERC's exclusive authority with regard to interstate transmission (*id.* at 902), and that the utility had no way of avoiding the transmission arrangement (*id.* at 903), in finding a direct conflict.

The other cases of this Court from which petitioner and the government extract language out-of-context offer no support for their position. Two were brought under the Civil Rights Act, 28 U.S.C. § 1983 (1982), which is different because Congress specifically intended to alter "the relationship between the States and the Nation with respect to the protection of federally created rights" embraced by the statute. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). They are treated in the margin.[47]

[46] This dispute later reached this Court through the state court system as *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

[47] *McNeese v. Board of Educ.*, 373 U.S. 668 (1963). The only question to be litigated was the factual question of segregation, since section 1983 had created a specific private right of action on which relief could be granted regardless of state law. It was only in this context that a "skein of state law" was used. *Id.* at 674. Moreover, the state administrative remedy was found deficient. *Id.* at 674-75.

Zablocki v. Redhail, 434 U.S. 374 (1978), involved a section 1983 challenge to a statute prohibiting marriage, without prior state approval, of certain persons. There were no pending state court proceedings in which to challenge the statute. The Court noted that under section 1983, absent issues of state law that might affect the federal claims, an individual can sue in a federal forum. *Id.* at 380 n.5. *Compare Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

County of Allegheny v. Frank Mashuda, 360 U.S. 185 (1959). The case involved a federal court applying state law under its *diversity* jurisdiction, and there was *no* contention of any federal statutory or constitutional conflict. (*See* n.27 *supra.*) Moreover, the state itself required the particular action to be brought in a separate proceeding. *Id.* at 188, 195-96.

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). The ostensibly limiting langauge quoted (Pet. Br. at 20, 22; Gov't Br. at 10) was

Comparison with the recent *Pennzoil* decision compels abstention here. There, the federal plaintiff was faced with the requirement of a $13 billion state appeal bond that stood as an obstacle to its appeal of a state judgment, and it had incurred substantial adverse financial effects from the judgment. The underlying dispute arose from a commercial contract in which the state had no substantive interest. The federal plaintiff sued under section 1983, challenging state appeal bond procedures under the federal Constitution, and it had succeeded in establishing its claim in the lower federal courts. This Court held that those lower federal courts should not have interfered, noting that Texaco had not taken its federal claims to the Texas state courts and holding that Texas' interest in the administration of the process by which its judgments were obtained was sufficient to merit abstention. Here, the facts are far more compelling. A state-authorized regulator is a party; the subject matter lies in an area of recognized state concern; the Rate Order challenged seeks to articulate state utility regulatory policy; a complex regulatory system is involved; and there is no special statute relied upon, such as section 1983, that indicates Congressional intent to allow a separate federal action to proceed. To the contrary, there are only statutes indicating that Congress intended to curtail use of the federal courts in just these circumstances.

C. Other Arguments Advanced by Petitioner and the Government Regarding Abstention Here Are Without Merit

1. Louisiana Has Far More Than an "Adjudicatory" Interest

Petitioner's argument that the state's interest here is only "adjudicatory" draws inappropriately from the *Pennzoil* case, where the interest of the state was arguably only as "adjudicator of wholly private disputes." 481 U.S. at 30 n.2 (Stevens concurring). Simply put, Louisiana's interest is not so limited here.

actually a predicate for creating a *new* kind of non-interference doctrine — even *absent* the circumstances that would *require* abstention under the established doctrines. (Thus, although abstention from the exercise of federal jurisdiction is "an exception"; when the specified factors justifying abstention are present, it then becomes the "*normal*" thing to do. *Younger*, 401 U.S. at 45.)

Instead, (1) the state-authorized regulator is a party; (2) Louisiana has a Congressionally recognized interest in the subject matter area, involving retail rates and practices; (3) it has an important interest in the process of reviewing and, if need be, correcting the actions of a state-authorized regulator, particularly in the utility area; and (4) it has an interest in the specific issue of management standards, posed by the Rate Order. Even assuming *arguendo* the unlikely proposition that the present circumstances will ultimately be determined to allow no role for state substantive action, the state has an undeniable interest here in "setting its own house in order." *Ohio Bureau of Employment Serv.*, 431 U.S. at 480.

2. Abstention Is Not, as Petitioner Claims, a Charade

Petitioner's position that federal courts only defer in abstention cases if they *first* determine the very federal issue claimed to undermine the state's "substantive" interest (Pet. Br. at 33) is not supported by *Ohio Civil Rights Comm'n*. There the Court rejected the attack on the state's jurisdiction on the special ground that, "[W]e have repeatedly rejected the argument that a constitutional attack on state procedures themselves 'automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases.'" 477 U.S. at 628. Petitioner views the abstention process as essentially a charade — that is, the federal court first decides the merits of the federal issue to determine if the state has a "legitimate interest"; and only if it finds no federal bar does it defer to the state to adjudicate the very issue it has decided. This is not the law and it cannot be squared with the tenets of comity.

Instead, as indicated above, the courts undertake a very limited assessment of the alleged federal bar to determine whether it is "direct" or "facial" and dispositive, and once that hurdle is cleared, they route the case through the state court system for the several compelling reasons previously discussed. *See Aluminum Co. of Am.*, 713 F.2d at 1030.

3. There Clearly Is a State Proceeding Pending

The government's argument that the state proceedings now pending should not be deemed to satisfy the "ongoing proceeding" criterion — because, it says, the Council's lawsuit was "unnecessary," the consumers only complained about the Council's moderation, and NOPSI's own actions were defensive — misconceives the requirement. The Council's own ratemaking and prudence inquiry, even though complete, constitutes an "ongoing proceeding" because it is subject to state judicial review. Indeed, the availability of review qualified the administrative proceeding as an on-going judicial proceeding in the first place. *Ohio Civil Rights Comm'n*, 477 U.S. at 627. Even if no other suits had been brought, the right to appeal satisfies the criterion. "[W]e believe that a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court . . . ." *Huffman*, 420 U.S. at 608. Clearly, the state's interest in both substantive issues and institutional processes cannot be defined by a party's artificial narrowing of its pleadings or its failure to appeal.

D. Petitioner's Claims of Harm, Even of "Irreparable Harm," Do Not Undercut the Propriety of Abstention Here; Moreover, They Were Facially Implausible

Complaints of irreparable harm do not state a basis for refusal to abstain. Interim relief, if merited, was available in the state courts, purposely bypassed here by NOPSI. As the Court noted years ago:

> Appellee complains of irreparable injury resulting from the Commission order pending judicial review, but has not invoked the protective powers of the Alabama courts to direct the stay or supersedeas of a Commission order pending appeal.

Alabama Pub. Serv. Comm'n v. Southern Ry. Co., 341 U.S. at 349. Similarly in *Burford*, the Court noted that, "Texas courts can give fully as great relief, including temporary restraining orders, as the federal courts." 319 U.S. at 327. In order to obtain federal consideration of injunctive relief where abstention is otherwise warranted, a plaintiff must show not merely "irreparable harm" but also "extraordinary circumstances" which would render the state court incapable of providing immediate equitable relief, *see Moore*,

442 U.S. at 433, as well as threatened injury which is "great [and] immediate." *Id.* None of these tests was met here.

Despite being told by the federal courts here in 1985 to utilize the state court system, NOPSI sought no preliminary injunctive relief in state court. Even when directed in this very case by the federal courts to utilize the state courts for preliminary relief, NOPSI never presented its claim of irreparable harm there. NOPSI has apparently been more interested in demonstrating that it could not rely on state courts, than in seriously litigating its claims there.

Turning to the substance of NOPSI's claim, it first asserts that it was "forced" to agree to a settlement — a statement utterly contradicted by the surrounding facts and contemporary judicial determinations (*see* p. 12 *supra*). Moreover, NOPSI fails to mention that the settlement was reached in March 1986, *after* the *initial* decision by the Fifth Circuit in *NOPSI I* which held that *no* abstention was warranted and *before* it was amended. If anyone was "forced" then to settle by an abstention decision, it was the Council. Also, that abstention was the subject of *NOPSI I* and was held to be correct, and this Court denied review.

Turning to the alleged irreparable harm here, NOPSI does *not* contend that the amount of disallowance was irreparably lost. The disallowance was not a refund to ratepayers, but rather a reduction on NOPSI's books of its Grand Gulf deferrals that could be resurrected as an asset for future collection in rates. (R.7., Cecil Aff., p. 4.) Nor did NOPSI seriously claim that it would become bankrupt and not be able to continue the litigation. (It is still very much alive.) Rather, its claims were attenuated and turned on conflicting contentions as to how "financeable" the operating plan for NOPSI was, given the disallowance.

In this respect, the case came to the district court in an unusual posture. The Council itself took the extraordinary step of moderating any financial impact on NOPSI, to a level that, based on substantial evidence, NOPSI could "sustain" (*i.e.*, continue in its business solvent, pay its Grand Gulf bills, and return to financial health). This indicated a disallowance of $150,000,000 — which the Council then reduced to $135,000,000 to provide a safety "buffer." The economic testimony, which was complicated, was

virtually the same as advanced to decide the "irreparable harm" issue; but NOPSI did not assert either that any of the Council's financial findings were arbitrary or that NOPSI was barred from relief in state courts.

NOPSI specifically complains that the district court did not hold an evidentiary hearing; but it omits to state that both NOPSI and the Council had filed extensive affidavits, depositions and briefs on the issue of irreparable harm; that a hearing was originally set; and that the court and counsel held a conference call in which it was decided that the record would be opened for the submission of additional depositions and other materials and the motions would be considered on that record. (R.9.) NOPSI did not object to this procedure or raise the matter on appeal. The district court's opinion recites that it considered all the affidavits presented and noted that NOPSI had also filed suit in Louisiana state court. The court clearly found no need here to provide emergency relief under the "extraordinary circumstance" rule.

As additional background, in *NOPSI I* the district court had held an evidentiary hearing on NOPSI's need for preliminary relief. NOPSI made specific claims about its imminent insolvency; access to financing being imperiled; and other dire events. The court found NOPSI's position not credible, denied an injunction, and held instead that the Council was using every means to keep NOPSI in a positive cash position. (*NOPSI I*, slip op. at 11-12.) As it turned out, NOPSI's predictions proved untrue; those of the Council's witnesses were validated. (R.7, Cecil Aff., p. 29.) Similar claims were presented here, and all of NOPSI's claims were contradicted by expert financial affidavits. While NOPSI's brief does not dwell on its claims, the government brief shows an inexplicable and uncritical solicitude for financial assertions that on their face simply do not constitute irreparable harm, much less extraordinary circumstances.[48]

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[48] The government apparently endorses NOPSI's recitals that the disallowance would "reduce its common equity" (any monetary penalty reduces a corporation's equity); eliminate its retained earnings (a balance sheet entry that is transitional and refills as new earnings are realized); render it unable to sell rate recovery bonds (a claim that was speculative in its own right, and did not preclude other financing options); and jeopardize its ability to continue to pay its FERC-mandated costs (clearly falling short of saying that it could not pay such costs); and make it unable

NOPSI, unlike an ordinary business, has a monopoly providing an essential service to a captive market and receives a steady stream of income at fixed rates. Here the Council's limited disallowance of $135,000,000 was a book deduction against accrued deferrals, representing the value of the entire projected disallowance over a number of years; but the impact was *gradual*, because it was to be implemented by providing a rate *increase* for NOPSI of 4.5% (or $16.6 million annually), rather than the 6% (or $22.1 million annually) that had been set by the parties' settlement, amortized monthly, beginning in April 1988. (JA-211.) Without more, the idea that NOPSI would suffer irreparable harm by the temporary withholding of $375,000 to $500,000 monthly, against allowed annual revenues of more than $325 million, while seeking preliminary relief in state courts, is so implausible as to merit no consideration.

E. Petitioner's Assertion that the Rate Order Interferes with Interstate Commerce Does Not Affect the Need for Abstention

NOPSI's claim (Pet. Br. at 2) that the Rate Order interferes with interstate commerce has no substance. The complaint limits this claim to the allegation that it was improper for the Rate Order to conclude that NOPSI's initial open-ended commitment to Grand Gulf was inappropriate (R.1, Complaint ¶ 38); but the Council based *no* relief on this finding. (JA-23-24.) Nothing in the complaint or in supporting affidavits states that the Rate Order has caused, or will cause, any of NOPSI's Grand Gulf costs to be shifted to the ratepayers elsewhere. To the contrary, there was testimony by NOPSI's President that the absorption of costs by individual companies in the Middle South system did *not* result in a shifting of costs to ratepayers elsewhere. (JA-54.) Moreover, the fact that each operating company on the Middle South system reached a separate rate settlement with its local regulator shows that no uniformity at the retail level jurisdiction was necessary. (*See* n. 24 *supra*.)

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to pay dividends on either preferred or common stock for at least five years (not indicating why this was irreparable either). NOPSI has met all of its Grand Gulf I obligations and recently paid a preferred dividend since the district court proceedings, according to public filings.

II. THERE IS NO PREEMPTION HERE, FACIAL OR OTHERWISE, THAT ELIMINATED THE STATE'S INTERESTS OR DEFEATED ABSTENTION

A. The Legislative History of the FPA and Other Statutes Shows Clear Intent To Prevent Encroachment Upon the States

Petitioner bases its preemption argument principally upon a misportrayal of the Federal Power Act's ("FPA") purpose — *viz*, that Congress believed interstate commerce would be "threatened" unless a "neutral forum" were established to allocate "interstate power pool costs" among the states and "between ratepayers and utility shareholders." (Pet. Br. at 2.) Nothing in the legislative history evinces any such concern. To the contrary, Congress voiced no criticism of state regulation but rather was concerned to protect it.

Before enactment of the FPA, states regulated the retail rates and practices of *intra*state utilities, but there was no federal agency to regulate interstate matters. Because the states were constrained by the Commerce Clause, there was a regulatory gap, bounded by the "bright line" drawn by this Court in the *Attleboro* case.[49] The FPA filled that gap by establishing the Federal Power Commission without detracting from the power of the states. In *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 211 (1964), the Court observed that Congress "apportioned regulatory power between states and federal governments according to [the *Attleboro* test] this Court has developed."

Thus, Section 201 of the Federal Power Act, 16 U.S.C. § 824 (1982), concludes with the specific limitation that federal regulation was "to extend only to those matters not subject to regulation by the States," and denies FERC jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1).

The legislative history is explicit on this point. The House Report on S. 2796, ultimately passed, stated that:

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[49] *Public Util. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927).

> [T]he Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce. . . . The bill takes no authority from State commissions . . . .

H.R. Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935); *see also id.* at 26-27. The Senate Report reflects that a predecessor bill failed in part because it impinged upon the states:

> The revision has also *removed every encroachment upon the authority of the States*. The revised bill would impose Federal regulation *only over those matters which cannot effectively be controlled by the States*. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an *effort to prevent the expansion of Federal authority over State matters*.

S. Rep. No. 621, 74th Cong., 1st Sess. 18 (1935) (emphasis added).

Moreover, contemporaneous legislation, the Public Utility Holding Company Act of 1935 ("PUHCA"), 15 U.S.C. §§ 79 *et seq.* (1982), indicates that Congress meant to insure that individual companies that were part of *multistate* holding companies were made *more* sensitive to local regulation.[50]

The history of the FPA and PUHCA has clear implications for the abstention question. *See Colorado River Water Conservation Dist.*, 424 U.S. at 814-15. As the Fifth Circuit stated in *NOPSI I*:

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[50] PUHCA, enacted along with the FPA, had as a key purpose *increasing* holding company responsibility to local interests and regulation.

> [T]he purpose . . . is simply to provide . . . effective Federal *and* State regulation . . . .
>
> * * *
>
> An operating system whose management is confined in its interest, its energies, and its profits to the needs, the problems, and the service of *one regional community* is likely to serve that community better, to confine itself to the operating business, *to be amenable to local regulation* . . . and responsible to the fair demands of the public . . . .

S. Rep. No. 621, 74th Cong., 1st Sess. 11-12 (1935) (emphasis added). The entire tenor of the Congress was one of respect for and enhancement of state utility regulation.

> The existence of this 'bright line' colors the way we view a preemption claim involving the Federal Power Act . . . . [F]ederal court intervention here may constitute a disruption of a *state* regulatory scheme, for *retail* rate making is clearly a field left to the jurisdiction of the states.
>
> * * *
>
> The structure of the Federal Power Act, preserving as it does state jurisdiction over retail rates, suggests that these local institutions should normally proceed unfettered by federal interference.

798 F.2d at 860-61.

Moreover, other statutes — the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), and the Johnson Act, 28 U.S.C. § 1342 (1982) — evince unmistakable Congressional intent that these matters be channelled through the state courts. The *Younger* opinion, noting Congress' manifest "desire to permit state courts to try state cases free from interference by federal courts," 401 U.S. at 43, cited the Anti-Injunction Act as exemplary. That Act prohibits federal courts from enjoining state court proceedings with few exceptions. Although the instant lawsuit seeks to enjoin a regulatory order, rather than a court proceeding to enforce the order, the underlying Congressional policy is similar, as evidenced by *Younger's* reliance on it.

In *Amalgamated Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511 (1959), the Court dismissed the argument that the Anti-Injunction Act should not apply where the state court was said to be "wholly without jurisdiction" because it was preempted by federal law. *Id.* at 515. The Court encountered the argument, *inter alia*, that "unless the federal court can intervene," delay would both undercut federal policy and harm plaintiff. *Id.* at 518. In response, the Court noted that Congress had "in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court," *id.*, and it presented an explicit description of the multiple consumptions of judicial time that result when a dual litigation track is opened, *id.* at 519, precisely as experienced here.

The Johnson Act — which bars district court injunction of any state "order affecting rates chargeable by a public utility" when four statutory conditions are met — is an absolute bar to district court relief. Although it has been given limited application by the lower courts, they often reach the same result on abstention grounds.[51] It was enacted, against a history of utilities' use of the lower federal courts to challenge state orders, to "limit the authority of the public utility corporation to delay, hinder, and impede the states in their regulatory actions." 78 Cong. Rec. 8335 (1934) (testimony of Sen. Hiram W. Johnson, sponsor of the Act). The accompanying legislative report explained the path that should be followed by a utility:

> [A public utility] will be required, in all cases where a State has set up a public-utility commission, to proceed before that commission if it has any complaint. It can appeal from this State board to the State courts; and if it is dissatisfied with the final judgment of the supreme court of the State, it can take an appeal to the Supreme Court of the United States. This is no injustice to the utility company. It is fair to all parties concerned. It would save time and a large amount of money.

78 Cong. Rec. 2038 (1934) (Report of the Senate Judiciary Committee).

B. Established Preemption Analysis Shows the Absence of Any Direct or Facial Claim of Preemption

State jurisdiction is preempted (a) when Congress has expressed a clear intent to preempt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), or (b) when it is otherwise clear that Congress has intended to "occupy the field" and leave no room for state law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Otherwise, state action is preempted only to the extent that it (c) *actually* conflicts with federal law, *Florida Lime & Avocado*

[51] Both the Fifth Circuit and the Fourth Circuit have held that the first statutory condition, requiring that "jurisdiction is based solely on . . . repugnance of the order to the federal constitution" is *not* satisfied where the Supremacy Clause is the basis and therefore reference to a federal law is also involved. Both abstained instead. *NOPSI I*; *Aluminum Co. of Am.*, 713 F.2d at 1028. While respondent disagrees with that statutory interpretation, the point is not argued here.

Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or (d) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, No. 86-1856, slip op. at 13-14 (U.S. Mar. 6, 1989).

Since it is clear here that Congress did not intend to preempt state regulation, but to preserve it; and did not intend to occupy the field, but to prevent encroachment upon state law, it would be necessary to conduct a plenary "conflict-pre-emption analysis." This analysis:

> must be applied *sensitively* in this area, so as to *prevent* the diminution of the role Congress reserved to the States while at the same preserving the federal role.

Northwest Central Pipeline Corp., slip op. at 20 (emphasis added). So stated, this clearly is a matter best left to state court development, and the federal courts should abstain without further detailed substantive analysis.

However, even proceeding further, there is no doubt about the result. The Council's order sets only retail rates. It accepts as a "given" the FERC-imposed cost share. It imposed a disallowance only on the basis of management's failure to realize cost-savings through other transactions. It does not stand as an obstacle to FERC's allocation of Grand Gulf costs, but rather assumes that NOPSI is obligated to pay these costs; and it moderates its remedy so as to avoid even indirect financial effects. No costs are passed to ratepayers in other states. Rather, the order requires the shareholders of the company to accept partial responsibility for imprudent management. Clearly, there is no federal purpose to insulate utility investors from the risks of bad management at the retail level.

The latter point underscores the interest that was involved in identifying utility conduct here, as viewed at the regulatory level, that was deemed intolerable. The Council found a course of managemental indifference to the ratepayers with respect to the company's Grand Gulf commitment. While the Rate Order's extensive evidence and findings cannot possibly be detailed here, summaries are set forth at JA-51 and JA-130.

The Council also found that the economics of Grand Gulf I had become problematical during the 1979-80 period; and that NOPSI, facing a large commitment, should have taken steps to diversify by seeking off-system sales,[52] replacing power, if needed, with alternative coal-fired power. Notwithstanding that the possibility of power sales clearly was on NOPSI's management's mind, NOPSI did nothing. If anything, it sought to deceive the public as to a deteriorating situation at Grand Gulf. (JA-101-102.)

While petitioner attempts to deride the Council's substantive findings, it is instructive to compare the vastly different, contemporaneous behavior of another utility, Public Service of New Mexico ("PSNM"), with respect to its participation in the Palo Verde nuclear plant, as to which the company stated that during 1979:

> [I]t took several steps to manage the effects on its generating capacity of external events . . . [including] a series of strategies to deal with the growing surplus of generating capacity, attempts to reduce PSNM's share of Palo Verde by selling ownership, [and] selling portions of the coal-fired San Juan plant. . . .[53]

— with the behavior of NOPSI's management's behavior here. (JA-122-129.)

The parties' substantive positions tell a tale of two cities. NOPSI's vision is that it could sit on its hands; except, perhaps, to keep the regulator uninformed, and could dissemble regarding the true state of affairs at Grand Gulf. (JA-24; JA-167.) The Council, however, required that NOPSI be accountable to the ratepayers, exercise diligence with respect to power commitments, and manage its risks through available alternatives. Had NOPSI done so, it would not have undercut *any* obligation established by the system or FERC respecting Grand Gulf, but would have remained

[52] The Council's findings, well-based in the evidence, relied on expert testimony; testimony by NOPSI's president and its senior vice president; a history of off-system power sales, particularly AP&L; the fact that the System Agreement had been amended to facilitate such off-system sales; and other factors. (JA-163, JA-166.)

[53] *Electric Utility Week*, Feb. 6, 1989 at 13 (summarizing the utility's sworn testimony in a state public service commission proceeding).

responsible for its share of costs and had offsetting revenues. (JA-165.) The effect would have been to spread the risks — prospective future benefits as well as losses — more widely. But NOPSI did nothing.

Petitioner attacks the substance of the Council's determination by referring to *dicta* of the district court in which the court believed, mistakenly, that the Council's determination rest upon finding a "sucker" to buy Grand Gulf power during the 1979-80 time period. With deference to the district court, this was simply neither the Council's finding nor its necessary basis. The Council had, in fact, addressed this very viewpoint because it had been advanced by a NOPSI witness. (JA-167.)[54]

C. The Decisions of This Court Did Not Preempt the Council's Rate Order

Petitioner's contention that *abstention* is barred by reason of this Court's decisions in the *Nantahala* and the *MP&L* cases, which deal with the substantive issue of *preemption*, is misplaced. Both cases followed *a state court path* to this Court, just as did *Northwest Central Pipeline Corp.*, and they represent a model for review here. Indeed, in *Nantahala* , the Court, instead of expressing criticism of federal abstention there, complimented the state supreme court on "an admirably thorough consideration of the myriad issues before it," 476 U.S. at 961, even though disagreeing with its conclusion.

Regarding preemption, both cases are sharply distinguishable. They involved state attempts to *alter* the FERC's interstate allocation of costs to the local utility for retail purposes; they

[54] Moreover, the district court's statements during the same discussion indicate a misconception of the Council's remedy. The district court believed that the Council had utilized its view that NOPSI should receive a 9% Grand Gulf allocation as its basis for computing the prudence disallowance, but this is inaccurate. An expert witness, whom the Council credited, testified that NOPSI should probably have tried to sell all of its expected share from Grand Gulf but, conservatively, might as a limitation be deemed to have retained 9% of it, which was NOPSI's relative share of system capacity. However, the Council imposed a remedy that was only about one-third the size that this testimony would have merited — *i.e.*, it was effectively as if NOPSI had been required to sell only a 3% portion to offset partially the cost of the 17% portion that had been assigned to it. (*See* JA-210.)

addressed facts where the utility had no choice; and neither case involved the additional evidence present here concerning a failure to pursue other transactions to reduce risks.

In *Nantahala*, the FERC had adopted a formula for the allocation of costs between utilities located in different states, but the state commission adopted an allocation more favorable to its own ratepayers and simply substituted it as a basis for retail rates.[55] This Court held that the "filed rate doctrine" prevented the state from substituting its own formula as a basis for retail rates and required the state to pass through the wholesale costs in order to avoid their "trapping." *Id.* at 970-71. The Court made clear that other retail ratemaking actions, including the recognition of savings, could properly be taken into account, and did not suggest that their offset against the wholesale rate would constitute impermissible "trapping." *Id.* at 968. Importantly, in the penultimate paragraph of the opinion, the Court distinguished the *Pike County* line of cases[56] on the basis of the *choiceless* nature of the utility's situation, noting that, "No source of power besides entitlement and purchased power from TVA is said to be available," *id.* at 973, and that both quantity and price had been fixed by the FERC. *Id.* Here, in contrast, the Council recognized both the price and quantity fixed by the FERC, but focused its attention on available alternatives that NOPSI's management failed to pursue.

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[55] In previous briefs, but not here, NOPSI has adverted to the case of AP&L, which in 1980 was allowed by the other companies to escape its contractual obligations to take Grand Gulf power (to which NOPSI inexplicably agreed). (JA-97.) AP&L's arrangement was achieved at the expense of the other Middle South companies, giving each a larger allocation. In Order No. 234, the FERC allocated a share to AP&L under its formula, notwithstanding the companies' prior agreement. Because the very issue before the FERC was the proper allocation among the companies, the AP&L arrangement, contravening the FERC's allocation, had to be set aside. In contrast, the Council's determination had nothing to do with the intrasystem allocation. It contemplated that NOPSI would accept and remain financially responsible for its share of Grand Gulf, but sell a portion off-system (JA-165), without interference with the FERC's allocation.

[56] *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 77 Pa. Commw. 28 (1983), among others, holds that because the FERC has approved a rate for power as "reasonable," this does not mean that it is prudent for a utility to accept or buy the power, if there are cheaper alternatives.

Similarly, in *MP&L*, the state supreme court had proposed to undertake a prudence inquiry, (1) in the precise areas reserved exclusively for FERC review (the decision to invest in Grand Gulf, to construct it and to bring it on-line), 108 S. Ct. at 2441; and (2) to override the FERC-ordered allocation to the end that the utility might be deemed "obligated to purchase less Grand Gulf power than" the FERC ordered. *Id.* at 2439. Here, in contrast, (1) the Council disavowed authority to take any action based on either NOPSI's decision to participate in the interstate arrangements for Grand Gulf I or the prudence of constructing or completing it; and (2) it indicated it would not have NOPSI pay any amount for Grand Gulf I other than that ordered by the FERC and assumed that NOPSI was required to make such payments. Critical facts are thus reversed. The Council took as given that NOPSI would be obligated to take and pay for a share of Grand Gulf. It asked instead whether management could properly do nothing in deteriorating economic circumstances and in the face of management's own assertion that it could sell power off-system.[57] The Council reached its decision based on evidence that management should have sold power, but did not do so — factual evidence that has no counterpart in the *MP&L* case. (JA-21, JA-209.)

Moreover, unlike the situation in *MP&L*, the matters underlying the Rate Order could not properly have been determined by the FERC because they raised concerns at an entirely different

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[57] Petitioner contends that the Court in *MP&L* actually ruled on the case here because Council participated there as *amicus*. This mistakes the role of *amici*. *See Sony Corp. v. Universal City Studios*, 464 U.S. 417, 436 n.16 (1984). Moreover, the Council urged only that the Court not rule on the prudence of pursuing offsetting transactions — a concern raised because the Mississippi Supreme Court was not entirely clear about the kind of prudence inquiry it envisioned. However, this Court's opinion was, in fact, clear in specifying that the proposed inquiry in *MP&L* was seen as one to evaluate the decisions to become a party to the Grand Gulf agreements, to construct Grand Gulf and bring it on-line. 108 S.Ct. at 2441. The Council's other position there was that it would be more orderly to obtain a decision of the state commission first because the state court's opinion was imprecise. This Court decided, however, to treat the state court judgment as "final" because the preemption question had "already been answered by the State Supreme Court." 108 S. Ct. at 2438 n. 11. In contrast, the state supreme court has *not* answered any preemption or regulatory question here, and this Court should not, we submit, become involved until it has done so.

level of utility operation. The FERC conducted no inquiry in its Grand Gulf proceeding into what any of the retail utilities could have done in their individual circumstances; but rather it deemed local factors irrelevant to the issue before it of allocating the plant cost among them. 108 S. Ct. at 2441. An inquiry into options available for the individual utilities and the prudent selections of choices among them was not within the FERC's own view of its jurisdiction. The FERC's acting chairman was clear that such an inquiry is "not generally within the scope of issues considered in reviewing the rates and terms for the jurisdictional sale of power." (*See* JA-58.) Indeed, the FERC abjured decision of issues at the retail level and declined, on grounds of deference to state regulation, even to consider "cost equalization" that might have moderated the impact of Grand Gulf costs. *Middle South Serv., Inc.*, 30 FERC ¶ 63,030, at 65,151 (1985).[58]

The issue of NOPSI's failure to seek off-system sales could not have been raised at the FERC (especially for the purpose of setting retail rates and practices). The FERC has power only to approve the rate and terms of an interstate transaction actually filed with it for approval, 16 U.S.C. § 824(e). (Contrast section 7 of the Natural Gas Act, 18 U.S.C. § 171f (1982), granting FERC certification authority.) It exercises this review on the basis of the seller's cost factors. *Monongahela Power Co.*, 39 FERC ¶ 61,350, at 62,095 (1987). Here, when the problem is that a utility *failed* to engage in such a transaction, there is *no* rate to file at the FERC to invoke its jurisdiction — much less to stimulate unprecedented

[58] In a lengthy footnote (Pet. Br. at 12 n.18) NOPSI contends that there is a FERC "methodology" (which NOPSI itself has concocted) by which the FERC would have undone NOPSI's off-system sales of power by attributing the sales to the "system" as a whole. There is utterly no basis for this — and particularly no basis for the unprecedented assumption that once the power costs of Grand Gulf were properly allocated among the companies, the FERC would have any interest in *preventing* the companies from making power resales. The FERC has never so contended. More importantly, NOPSI *never* raised this argument during the prudence hearings nor in any of the federal courts below. Rather, the argument appeared for the *first* time in NOPSI's brief submitted in Louisiana *state* court ("Memorandum in Support of Petition for Review" (Aug. 8, 1988) at p. 8, filed in No. 88-4511, pending in Civil District Court for the Parish of Orleans). It should first be decided there.

FERC inquiry into a retail area. As a result, the utility here would, if no state review were possible, escape regulation entirely.[59]

During the prudence inquiry, NOPSI made quite a different argument — to the effect that the Middle South "system" would use the intercompany agreements somehow to subvert and prevent NOPSI's off-system sales — notwithstanding explicit evidence that the system agreements had been modified to facilitate such sales. NOPSI's position did not survive cross-examination. (JA-164-165.)

Petitioner also argues that the Council's finding "rests on the premise that the allocation was unreasonable" — which, it says, is contrary to FERC's determinations. (Pet. Br. at 12.) Similarly, it argues that the Council's disallowance "ultimately rests upon its findings that the Grand Gulf I power was 'excessively priced or uneconomic for other reasons.'" (Pet. Br. at 10.)[60] NOPSI also contends that since the Court in *MP&L* stated that it cannot be "unreasonable" for MP&L to procure the power FERC has ordered it to pay, then "[o]bviously . . . it cannot be unreasonable to retain it." (Pet. Br. at 36.)

These arguments use words in shifting senses that confuse the reasonableness of the FERC's allocation among the companies with the commercial realities facing NOPSI's management. The Court of Appeals reviewing the FERC order has characterized Grand Gulf as "catastrophically uneconomical." A "reasonable allocation" of a "catastrophically uneconomical" power source does not mean that resulting power costs are

[59] Indeed, the only way that the prudence of not making off-system sales could in theory have been properly raised before the FERC would have been through the complaint of a different and hypothetical wholesale customer of NOPSI (*i.e.*, *not* the one buying the Grand Gulf power from it), whose rate was based at least in part on NOPSI's Grand Gulf costs, arguing that NOPSI's wholesale rate for it was too high, by reason of NOPSI's failure to sell. There was never such a complaint filed by such a hypothetical wholesale customer, and thus no basis on which the FERC could acquire jurisdiction to consider the matter. This situation would, in any event, provide no way for the Council to raise the matter before the FERC.

[60] NOPSI's quotation is drawn not from the facts or determinations made in this case, but from a hypothetical dealing with leasing that was put forward in the Council's Brief in Opposition to the Petition for *Certiorari*. (Pet. Br. at 10, 14.)

economic in any real-world sense, nor that a utility should be freed of responsibilities to moderate their effects if it was possible to do so. If the utility had *no* alternative, management may not be faulted. Thus, the choiceless nature of the situation was essential to both the *MP&L* and *Nantahala* decisions, and no other alternative was proposed. Here, however, it has been determined, as fact, that such a choice existed. If it existed, then, as a matter of utility responsibility, it was imprudent not to take advantage of it. There is no conflict whatever with the Court's rulings.

CONCLUSION

Petitioner's brief is unclear on the relief it requests, but the government asks that this matter be remanded to the district court for full consideration of the preemption claim on the merits. (Gov't Br. at 13.) Respondent agrees that there should be full consideration of the merits, but in Louisiana state courts, where they have been argued. The government and NOPSI should not be pressing a point lost many cases ago, that the lower federal courts should be viewed as protectors of federal law and the state courts as the enemy. The decision below to abstain should be affirmed.

Respectfully submitted,

OKLA JONES, II
City Attorney
BRUCE E. NACCARI
Assistant City Attorney
BEVERLY ZERVIGON
Administrator, Council
Utility Regulatory Office
1300 Perdido Street
New Orleans, Louisiana 70112
(504) 586-4651

CLINTON A. VINCE*
BERNHARDT K. WRUBLE
NANCY A. WODKA
JOHN S. MOOT
VERNER, LIIPFERT,
BERNHARD,
McPHERSON AND HAND,
CHARTERED
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

KENNETH M. CARTER
SIDNEY H. CATES, IV
CARTER & CATES
Suite 1230 Energy Center
1100 Poydras Street
New Orleans, Louisiana70163
(504) 569-2005

WALTER J. WILKERSON
WILKERSON, HENRY &
PEREZ
Suite 1800, Poydras Center
650 Poydras Street
New Orleans, Louisiana 70130
(504) 522-4572

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*Counsel of Record